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Noncommercial Broadcasting Freedom of Expression Act of 2000: Summary and Background of Related Legal Issues

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Summary

On December 29, 1999, the Federal Communications Commission (FCC) released an order approving the license transfer of WQEX—a noncommercial educational television station—from WQED (the license holder) to Cornerstone Television, Inc, a broadcaster that engages primarily in religious programming. In approving the transfer, the FCC issued “additional guidance” on the educational programming requirements applicable to noncommercial educational (NCE) television licensees and concluded that “programming primarily devoted to religious exhortation, proselytizing, or statements of personally held religious views and beliefs generally would not qualify as ‘general educational’ programming.” Amid a firestorm of complaints and criticism over the order, the FCC reconsidered and vacated the “additional guidance” on January 28, 2000.

Despite the recission, there has been continuing concern over the remnants of the analysis underlying the FCC’s ruling and its potential impact on future decisions by the agency to grant NCE licenses to religious broadcasters. In response, H.R. 4201—the “Noncommercial Broadcasting Freedom of Expression Act of 2000”—seeks to statutorily “clarify the service obligations of noncommercial educational broadcast stations.” This report will provide a summary of the bill and background on the issues that led to its introduction. The report will be updated as warranted by legislative action.

Background: FCC Licensing of NCE Broadcast Station and the “Additional Guidance” on NCE Programming Obligations

The FCC derives its authority to grant licenses for noncommercial educational broadcasting from section 303 of the Communications Act of 1934, which authorizes the Commission to prescribe “the nature of the services to be rendered by each class of licensed station.”¹ Under its rules governing NCE television stations, such licenses are granted only to “nonprofit educational organizations” upon a showing that the station will be used “primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.”² NCE stations are permitted to transmit “educational, cultural and entertainment programs, and programs designed for use by schools and school systems”; and may broadcast programming produced by others so long as no consideration is excepted by the station. In addition, NCE licensees are restricted from broadcasting promotional announcements on behalf of for-profit entities in exchange for any remuneration.³

The controversial “additional guidance” on NCE programming responsibilities was incorporated within an order approving the license transfer of WQEX—a NCE station—from WQED (the license holder) to Cornerstone Television, Inc., a religious broadcaster in exchange for a commercial station held by Cornerstone.⁴ During the FCC’s review of the transfer application, objections were raised by parties opposing the transfer that the NCE station would not be used “primarily to meet the educational needs of the community,” as Cornerstone’s proposed programming for the station was primarily religious in nature. In addressing this issue, the FCC examined previous precedent in which it concluded that some religious programs could be characterized as “general educational” for purposes of its rules. With respect to Cornerstone, the Commission concluded that the broadcaster had made a sufficient showing and deferred to its judgement that its programming, although primarily religiously oriented, would “serve the educational needs” of the community.

The “additional guidance” attached as part of the WQED application was issued, according to the FCC, as an attempt to clarify the requirements applicable to the programming of NCE television stations set out in its rules. Under the guidance statement, the Commission noted that the requirement that the NCE station “be used primarily to serve the educational needs of the community” was two-fold. With respect to a licensee’s overall weekly program schedule, “more than half of the hours of programming aired... must primarily serve an educational, instructional, or cultural purpose in the station’s community of license.” To qualify as a program which is educational, instructional, or cultural, the program must have “as its primary purpose service to the educational, instructional or cultural needs of the community.”

With respect to religious programming, the FCC stated that it would not disqualify any program “simply because the subject matter of the teaching or instruction was religious in nature.”⁵ The Commission, acknowledged that the “discussion of religious matters during a program that has as its primary purpose service to the educational, instructional or cultural needs of the broader

¹ 47 U.S.C. § 303(b). The FCC first set aside channel capacity in the FM radio band for noncommercial educational radio broadcasting in 1945; and reserved 252 channels for educational television service in 1952.

² See 47 C.F.R. §73.621(a).

³ *Id.*

⁴ See *Applications of WQED and Cornerstone Television, Inc. for Consent to the Assignment of License of Noncommercial Educational Station WQEX (TV)*, 15 FCC Rcd 202 (December 29, 1999).

⁵ *Id.*

community” could be considered “general educational” programming for purposes of its rules.⁶ However, the Commission noted that “programming primarily devoted to religious exhortation, proselytizing, or statements of personally held religious views and beliefs” would not qualify as “general educational” programs.⁷ Accordingly, while church services would not qualify as “general educational” programming under the rules, such services which are part of an “historic event,” such as a funeral of a national leader would so qualify if the primary purpose is to serve the educational, instructional and cultural needs of the entire community.

Amid numerous complaints from religious broadcasters and members of the public, the FCC issued a subsequent order vacating its “additional guidance” statement.⁸ The Commission conceded that its attempt to clarify NCE programming obligations and to apply the guidance to specific cases involving religious programming had “created less certainty, rather than more.”

Despite the revocation of its guidance statement, there remains continuing concern over the administrative process by which the FCC set out the policy and the underlying premise, apparently held by the agency, that certain types of religious programming does not qualify as “educational”. Given the characterization of its order as a “clarification” of its existing policy, the possibility remains that the agency could apply these principles in subsequent proceedings involving the licensing of NCE stations to religious organizations. In addition, the FCC’s attempted imposition of quantitative programming standards; the categorization of programming; and the exclusion of certain types of religious programmers from eligibility for NCE licensing raises constitutional concerns related to the free speech and free exercise [of religion] clauses of the First Amendment.⁹

H.R. 4201: The “Noncommercial Broadcasting Freedom of Expression Act of 2000”

Introduced by Representative Pickering on April 6, 2000, H.R. 4201 seeks to “clarify the service obligations of noncommercial educational broadcast stations.”¹⁰ The bill would amend section 309 of the Communications Act of 1934 to statutorily authorize nonprofit organizations to hold a noncommercial educational radio or television license “if the station is used primarily to broadcast material that the organization determines serves an educational, instructional, cultural or religious purpose... in the station’s community of license, unless that determination is arbitrary or unreasonable.”¹¹

In addition, H.R. 4201 would prohibit the FCC from imposing additional content-based requirements on NCE licensees, namely: quantitative standards “based on the number of hours of programming that serve educational, instructional, cultural or religious purposes” and any other

⁶ *Id.* The Commission listed examples of such programming including “programs analyzing the role of religion in connection with historical, or current events, various cultures, or the development of the arts; exploring the connection between religious beliefs and physical and mental health; and examining the apparent dichotomy between science, technology and established religious tenets...” *Id.*

⁷ *Id.*

⁸ See *Applications of WQED, Pittsburgh and Cornerstone Television, Inc. For Consent to the Assignment of License of Noncommercial Educational Station WQEX (TV)*, 15 FCC Red 2534 (Order on Reconsideration)(January 28, 2000).

⁹ For a more general discussion of the underlying First Amendment issues involved, see *Freedom of Speech and Press: Exceptions to the First Amendment*, CRS Report 98-815; *The Law of Church and State: Developments in the Supreme Court Since 1980*, CRS Report 98-65.

¹⁰ H.R. 4201, 106th Cong. 2d Sess. (2000).

¹¹ *Id.* (emphasis added).

content-based requirement not imposed on commercial licensees. The bill clarifies however, that NCE licensees remain subject to applicable provisions of the Children’s Television Act and the requirements of the Public Broadcasting Act.¹²

Moreover, the bill exempts NCE stations from provisions under section 312(a)(7) of the act, requiring broadcasters to allow “reasonable access” to the broadcast station by legally qualified candidates for Federal elective office. Also included are provisions to require public broadcast stations to be audited to determine their compliance with donor privacy protection requirements and to direct the FCC to amend its rules governing political broadcasting (sections 73.1930 through 73.1944) to render them inapplicable to NCE licensees.¹³

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¹² *Id.*

¹³ Sections 73.1930 through 73.1944 impose various requirements on broadcasters governing political editorials; equal opportunities for legally qualified candidates for public office; rates charged to candidates for use of the broadcast station; maintenance of “political files” for requests for broadcast time made by candidates; and reasonable access by candidates for Federal elective office, respectively. 47 C.F.R. §§ 73.1930-73.1944.